The Central Law Journal.

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## CURRENT EVENTS.

ANOTHER LAW LIBRARY FOR SALE.—The heartless shout of the auctioneer of "Going, going, gone!" at the sale of Charles O'Conor's library has scarcely died away, and now the library of another eminent lawyer goes to sale, but this time not at auction. The library of the late James Bethune, Q. C., of Toronto, has been catalogued by Messrs. Carswell & Co., of that city, and is offered for sale as second-hand books at prices annexed. It is a large and various collection in which we notice a very great number of American publications. It is the collection of a practitioner who died in his forties, a period when, in an English sense, a man is still young. He fell a victim to that scourge of the northern summers, typhoid fever, at a time when it seemed there were at least thirty years of professional labor, usefulness and honor before him. It can scarcely be doubted that, had he lived, the highest judicial positions in Canada would have been open to him.

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CODIFICATION OF THE COMMON LAW.—A valuable contribution to this disputed subject comes to us in the form of a pamphlet embodying a series of papers read before the Bar Association of Tennessee, at its meeting last year, by J. A. Cartwright, W. O. Vertrees and J. M. Dickinson, of Nashville, and John L. T. Sneed, of Memphis. These papers are short, scholarly and readable. Mr. Cartwright takes ground in favor of codification, which he declares to be the natural and inevitable result of progression in all legal systems. Mr. Vertrees argues powerfully against such an attempt, and goes so far as to assert that the code of Justinian was an absolute failure. The code of Frederick, in his opinion, proves only that codification may be useful for obtaining political or dynastic objects; but it has no tendency to show that it is an improvement of the law. Judge Sneed, whom our readers will recognize as formerly a judge of the Supreme Court of Tennessee, takes very conservative views of the subject—so conservative that many young men might pronounce them "old fogy" views. He says: "In my judgment, one of the greatest evils under the sun is the rapid accumulation of books of reports which contain no new doctrine. Just think of it. A hundred years ago there was not a book of reports on this side of the sea. Ninety years ago there were only two. And yet that was confessedly the Augustan age of great American lawyers. Now, there are between three and four thousand, and they are accumulating in this country at the rate of about a hundred every year. It was found that there were not geese enough in all the world to supply the judiciary with quills to write opinions with, and an ingenious artisan at Sheffield invented steel pens and scattered them broadcast over the world, mainly to meet the demands of the *cacoethes scribendi*, which, like an epidemic, had smitten the common law and equity courts of England and America." He even takes the position that courts ought to deliver their opinions *ore tenus*, and not in writing. It is singular that one who has had experience as a judge of an appellate court should take such a position. It is our deliberate judgment that the statutes of those States which require the appellate judges to deliver written opinions in every case, are founded in the very highest wisdom. The habit, as we have often remarked, is a necessary check upon hasty and perfunctory work by the judges. Mr. Dickinson, on the other hand, advocates codification. "My conclusion" says he, "is, that the greater portion of our laws may be reduced by codification to a homogeneous, scientific system, not only making the law easy of access, but purging the obsolete, reconciling many conflicts, and making a reliable guide for the decision of a large portion of questions that now must be solved by the most laborious investigation. That the system could be made complete, and that when the work was done it could be said to contain the whole body of the common law, I do not contend; but certainly a great stride can be made in that direction with manifest benefits. The codification would not build a Chinese wall about the law that would shut out all progress."

American Building Association News.—We receive from time to time a monthly publication, issued at Chicago, bearing the above name. It is well edited and worthy of the patronage of those interested in this kind of investment. Building associations have been in former times mere cloaks for usurious contracts, and, as such, the courts have treated their schemes. But, properly managed, as they now seem to be in most of the large cities, and as we believe them to be in St. Louis, they afford a safe means of investment at a reasonable rate of interest upon real estate security, to those having money to invest; and they enable well-to-do people to acquire homes by appropriating a portion of each month's income in paying for them—the mortgage bearing a reasonable rate of interest. They are thus beneficial alike to the lender and to the borrower. Their loans are more advantageous than ordinary real estate loans, because they are more flexible. A person desiring to sell his house, upon which there is a building association loan, may generally pay off the loan in a lump, if the purchaser so desires; and consequently, when a cash purchaser comes along, the fact that the house is in a building association furnishes no obstacle to a bargain; whereas, it would be an obstacle if it were encumbered by an ordinary real estate mortgage.

Injunctions in Governmental Matters.—Some months ago, reading various newspaper accounts of a municipal imbroglio in the City of New York in which writs of injunction played a conspicuous part, we ventured to express the opinion that it was an abuse of the jurisdiction exercised by courts of equity by means of a writ of injunction, to use it for the purpose of controlling the acts of the officers of corporations in public or governmental matters.[1] The case to which we particularly referred has lately come before the Supreme Court of New York for decision, in general term, and that court, according to newspaper report, takes much the same view of the question which we took, Judge Ingraham, in his opinion, saying: "To hold that the judicial body could inquire into the motives of the executive in the exercise of the power conferred on him, and control him in the exercise of such power, would be to transfer the power from the executive, in whom it is vested, to the judicial body."

[1] 20 C. L. J. 22.

## NOTES OF RECENT DECISIONS.

Husband Confessing Judgment in Favor of Wife.—In *Bronson v. Maxwell*,[2] the Supreme Court of Pennsylvania rule that, where a husband is honestly indebted to his wife and to other persons, he may lawfully confess a judgment in her favor, the effect of which will be to secure her in preference to his other creditors. In giving the opinion of the court, Mercur, J., states the doctrine thus: 'A married woman may loan money to her husband, and take security for its payment either at the time of making the loan, or subsequently, as any other creditor may do. If the validity of the debt from the husband to the wife be questioned by a creditor of the former, it should be proved satisfactorily by clear evidence. Hence the learned judge said to the jury, when a wife claims to hold property against the creditors of her husband, the burden of proof is on her to show affirmatively, by clear and satisfactory evidence, that she did not acquire it from him or by her own labor or earnings. When a husband is honestly indebted to his wife and to other persons, he may lawfully confess a judgment in her favor, the effect of which will be to secure her in preference to his other creditors.[3] An execution thereon may issue against him without his consent in the name of his wife.[4] For an honest purpose, and to secure or pay a just debt due by him to his wife, he may make a valid sale or transfer of his real estate to her, with like effect as to any other of his creditors. Such conveyances, however, should be carefully scrutinized, and the indebtedness be clearly established."

Juries in the Federal Courts.—In *Brewer v. Jacobs*,[5] in the United States Circuit

[2] 42 Leg. Int. 82.
[3] Wingerd v. Fallon, 14 Norris, 184.
[4] Rose v. Latshaw, 9 Norris, 507.
[5] 22 Fed. Rep. 217, 245.

Court for the Western District of Tennessee, Mr. District Judge Hammond, in passing upon a motion for a new trial in an action for malicious prosecution, considered at much length and in a very learned and painstaking way the subject of the impannelling and challenging of jurors in actions in the courts of the United States. He ruled the following propositions: "The objection that one of the jury was not of lawful age, and was not a freeholder or householder, comes too late after verdict, in Tennessee practice, which the federal court follows, unless something more is shown vitiating the verdict than that the juror was so disqualified. And if one appear who is not summoned to serve as a juror, in place of one drawn from the box, it is doubtful if the objection be good after verdict. The practice of the federal court is to examine each juror as he is called, touching his statutory qualifications, upon his oath, and if he answers satisfactorily, to accept him for the term. But in effect the jury is tendered to the parties in each case as it is successively called for trial, and they must then challenge for cause that a juror is too young, or otherwise similarly disqualified, or the objection will not be entertained after verdict, although the defect was wholly unknown to the parties at the time the jury was sworn." He cited a number of authorities[6] to show the disfavor with which courts look upon objections to the competency of jurors after verdict, and quoted with approval the following rule laid down in a recent work: "The rule is very well settled that, after a verdict, these formalities will not be permitted to affect the result, although they did not sooner come to the knowledge of the party complaining, unless positive injury can be shown to have accrued therefrom."[7]

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ACTION TO RECOVER ILLEGAL CHARGES OF COMMON CARRIER.—In the case of *West Virginia Transportation Co. v. Sweeser*, decided by the Supreme Court of Appeals of West Virginia, at Wheeling, on March 21, (opinion by Green, J.,) the court rule the two following propositions: 1. If a person be engaged in buying oil in an oil region and shipping over a railroad from the oil region, and there is no other outlet for this oil except by transporting it over this railroad, and under these circumstances he agrees to pay to the railroad company more than its legal rates of charge for the freight of such oil, and does make such payments from time to time in order that he may get his oil transported to market in the only manner in which he could transport it, through such payments are made after each shipment of oil has been made and the oil delivered, such person must be considered as making such payments not voluntarily but by compulsion, and he has a right of action for money had and received to his use, to recover back the excess of freight so paid by him over the amount which the railroad company had a lawful right to charge, or to offset this excess against the railroad company's charge if it brings an action of assumpsit against such shipper. 2. In such action to recover back such excess of payments made beyond the legal rate of charges there is no necessity for the plaintiff to prove that he demanded the repayment of such excess by the railroad company before instituting such suit.

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## COUNTER CLAIMS IN ACTIONS *EX DELICTO*.

Under the practice which prevailed before the adoption of the code, a counter-claim, whether arising on contract or based upon another tort, could not be pleaded in actions *ex delicto*. The codes of the various States, however, now permit the use of a counter-claim, under certain circumstances, in actions for tort.[1]

The right to plead a counter-claim in actions *ex delicto* is founded on the following clause incorporated in all our codes, viz.; "A cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim or connected with the cause of action."

[6] McClure v. State, 1 Yerg. 206; Gillespie v. State, 8 Yerg. 507: Ward v. State, 1 Humph. 253; Calhoun v. State, 4 Humph. 447; Hines v. State, 8 Humph. 598; Bloodworth v. State, 6 Baxt. 614; Draper v. State, 4 Baxt. 253; Howerton v. State, Meigs, 262; Troxdale v. State, 9 Humph. 411; Brakefield v. State, 1 Sneed, 215; Aylett v. Stellam, Style, 100; Loveday's Case, Id. 129; Cotton v. Daintry, Vent. 29.

[7] Thomp. & M. Jur. § 295, and cases cited *in nota*.

[1] Chambert v. Cagney, 41 How. 127.

This clause provides for three distinct species of counter-claim, viz;

1st. A cause of action existing in favor of the defendant and against the plaintiff and arising out of the *contract* set forth as the foundation of plaintiff's claim; or,

2nd. A cause so existing arising out of the *transaction* set forth as the foundation of plaintiff's claim; or,

3rd. A cause so existing *connected with the subject* of the *action*.

And in the cases under discussion the counter-claim must be either of the second or third species, and will never be of the first, that is, it must either arise out of the "transaction" forming the foundation of the plaintiff's claim or else it must be "connected with the subject of the action".[2]

In order to understand the bearing of these provisions of the code we must have a clear appreciation of what is meant by the term "*transaction*" and phrase "*subject of the action*".

The term "transaction" has been given a broader meaning than the word "contract," and includes any occurrence between the parties that may become the foundation of an action.[3] Or, the transactions meant are those which, although not precisely contracts yet, being dealings or business matters of some kind, would entitle a party to a remedy in an action *ex contractu*, and would entitle a defendant in such action to recoup any damages for a cause of action arising out of such dealings or matters;[4] or, it includes all the facts and circumstances out of which the injury of which plaintiff complains arose.[5]

It refers to the actual facts and circumstances from which the right results and not to the form and manner in which the facts are averred.[6] Therefore if the "transaction" originated in contract, a breach of contract may be set up by defendant, as a counter-claim, even though plaintiff's suit be for tort.[7] Nor can the plaintiff by suing in tort, where he has an election to sue either in tort or on contract, deprive the defendant of the right to interpose a counter-claim.[8] As to what constitutes the "*subject of the action*" the decisions are not at all harmonious, the following, however, given by a well known writer is doubtless correct, viz.:

"In an action for a tort, the injury complained of is the wrong, and the subject of the action would be that right, interest, or property which has been affected—as, in replevin or trover, the property taken; for libel or slander, the character or occupation; for an injury to a servant, the service; for the seduction of, or for harboring, a wife, the marital relation; for negligence, the duty, property, or person in respect to which the negligence occurred; for false imprisonment, the plaintiff's liberty; and for a trespass upon property,—the property."[9] Therefore if the defendant's cause of action has an immediate and direct connection with the right, interest, or property affected, he is justly entitled to plead it as a counter-claim.

The following examples of cases of tort wherein the question of counter-claim arose and was discussed, will fully illustrate the subject. Thus, in a suit for the conversion of certain gunny sacks, a counter-claim for damages caused to defendant by plaintiff's breach of contract to furnish potatoes of certain quality in the sacks in question was held proper.[10] So, in a suit to recover the value of certain bonds, received by defendant as attorney for plaintiff, a counter-claim for services in procuring the bonds to be issued to plaintiff was admitted.[11]

And, where certain property was obtained under a contract of employment, the defendant was allowed to counter-claim for his services and expenses as plaintiff's agent, in an action for converting the goods.[12]

The owner of a quantity of petroleum delived it for storage to a company formed for the purpose of transporting and storing such oil, under an agreement that certain allowances should be made for evaporation and certain charges be paid for storing. In an action for its conversion the allowance agreed

[2] Xenia Branch Bank v. Lee, 7 Abb. 372.
[3] Bliss Code Pld. Sec. 125.
[4] Barhyte v. Hughes, 33 Barb. 320.
[5] Ritchie v. Hayward, 71 Mo. 560.
[6] Pom. on Rem. § 788.
[7] *Ante*, Ritchie v. Hayward.
[8] Pom. on Rem. Sec. 770; Thompson v. Kessel, 30 N. Y. 383; Cow Run Tank Co. v. Lehmer, S. C. Ohio, 20 Cent. L. J. 296; Gordon v. Brune, 49 Mo. 570. But see *contra* Scheunert v. Kaehler, 23 Wis. 523.
[9] Bliss Code Pld. § 126.
[10] 71 Mo. 560.
[11] Judah v. Trustees, etc. 16 Ind. 56.
[12] Bitting v. Thaxton, 72 N. C. 541.

for evaporation and the amount due for storage were held proper subjects of counter-claim by the company.[13]

And, in an action in the nature of trover by a plaintiff who had endorsed notes or bills of exchange, brought to recover the value thereof from a defendant in whose possession they were and who claimed title through the plaintiff's endorsement, the defendant was permitted to set up title in himself, demand of payment, protest and notice, and ask by way of counter-claim a judgment against the plaintiff as endorser.[14] So, in an action of replevin to recover the possession of personal property delivered to defendant under a contract, it was held that defendant might set up as a counter-claim, a lien arising in his favor by virtue of the same contract.[15] And, in replevin for a horse the defendant was allowed to counter-claim damages for fraudulent and false representations in the sale of land, for which the horse had been traded.[16] So, in an action to recover damages caused to a canal boat by the breaking of an embankment, the defendant was permitted to counter-claim the damages caused to the canal by the plaintiff's negligence.[17] And, a mortgagee of personal property who had peaceably taken possession of the same before forfeiture, in an action for trespass might counter-claim his claim under the mortgage, as the mortgage and the mortgagee's claim there under were connected with the cause of the action.[18]

But, where the complaint charges the wrongful conversion of the proceeds of goods sold by defendant on commission, the defendant cannot set up a counter-claim for damages caused by plaintiff's breach of stipulations contained in the agreement under which the goods were delivered, but not having any reference to the very goods in question.[19] The court here took the ground that the tort was the subject of the action and the sole foundation of plaintiff's claim and that in such actions a counter-claim could not be pleaded. It is difficult however, to reconcile the reasoning in this case with a subsequent case decided by the same court.[20]

Damages done to trespassing cattle in driving them out is not a proper subject of counter-claim in an action for the trespass.[21]

Nor, is a libel published of and concerning the defendant, a proper counter-claim in an action for damages for an assault and battery.[22] In an action for an assault and battery an assault and battery committed upon the defendant by the plaintiff at the same time and place cannot be pleaded as a counter-claim.[23] The contrary has been held in Kentucky, however.[24]

From the foregoing examples it will be observed that the counter-claim allowed were in actions for injuries to some right or interest connected with property and that with but a single exception, none were allowed in actions for personal torts, and it is difficult to conceive of a counter-claim ever arising out of such torts.

Lastly, the framers of our codes labored to simplify the practice and to lessen litigation and in providing for the counter-claim they no doubt intended that parties should determine in each suit all matters in controversy between them, which could legitimately be included therein, keeping in view their substantial rights. This object can only be attained by giving a broad and liberal interpretation to this provision of the code.

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Lincoln, Neb.

[13] Cow Run Tank Co. v. Lehmer, *Ante.*
[14] 7 Abb. 372, *Ante.*
[15] Brown v. Buckingham, 11 Abb. 387.
[16] Walsh v. Hall, 66 N. C. 233.
[17] McArthur v. Green Bay Canal Co., 34 Wis. 139.
[18] Brown v. Phillips, 3 Bush. 656.
[19] Schenert v. Kaehler, 23 Wis. 523.
[20] 34 Wis. 139.
[21] Lovejoy v. Robinson, 8 Ind. 399.
[22] McDougal v. McGuire, 35 Cal. 274.
[23] Schnaderbeck v. Worth, 8 Abb. 37.
[24] Slone v. Slone, 2 Met. (Ky.) 339.

## MARRIED WOMEN'S ATTORNEYS AT LAW.

Under this title two closely related subjects will be discussed, the first involving the right of a married woman to act by attorney, and the second, the rights of her attorneys to fees.

### I.—APPOINTMENT OF ATTORNEYS AT LAW BY MARRIED WOMEN.

1.—*At law, independently of statute.*—At common law a married woman could not ap-

point an attorney at law:[1] her antenuptial appointment was revoked by her marriage;[2] she could not appear in a suit by attorney;[3] her plea or answer filed by an attorney was worthless;[4] a judgment entered against her on her warrant of attorney was nullity;[5] her agreement for alimony made by her attorney was void;[6] she was merged in her husband and had no contractual capacity at all.[7]

2.—*In equity, independently of statute.*—In equity, speaking generally, a married woman could appoint an attorney to represent her whenever she had interests separate from her husband.[8] She could appoint an attorney to conduct litigation respecting her equitable separate estate.[9] She could always obtain permission to answer and defend separately, if her property was involved.[10]

3.—*Under statutes.*—Under statutes expressly authorizing a married woman to make an attorney or to contract generally, she may, of course, appoint an attorney.[11] And statutes authorizing her to sue independently of her husband,[12] or to contract with respect to her property;[13] or securing to her the separate enjoyment and control of her property,[14] by implication give her the power to employ an attorney to take charge of such suit or perform legal services respecting such property, for it is necessary to the enjoyment of rights that one should be able to prosecute and defend them.[15] The appointment of attorneys at law is governed substantially by the same rules as the appointment of any other agent;[16] and when a married woman can act personally under the statute she can generally act through an agent.[17]

4 *How far bound by Attorney's acts.*—In all cases where a married woman can appoint an attorney, she is bound by his acts as an unmarried woman would be:[18] by his laches,[19] his withdrawal of pleas,[20] his settlement or dismissal of the suit.[21]

### II. COMPENSATION OF MARRIED WOMEN'S ATTORNEYS.

An attorney who has acted on behalf of a married woman, may look for his fees (1) to her husband, or (2) to her trustee or next friend, or (3) to her property or herself

1.—*The husband's liability.*—Since a wife always sued and was sued jointly with her husband at common law,[22] and since he had full control of the suit and the right to employ counsel for them both,[23] the payment of the fees naturally fell upon him. But when he acted in such a way as justified her in suing him, she could proceed alone, and the question arose whether he was not liable for the expenses of the suit on the ground that they were necessaries.[24] It has been held that when a wife sues out a peace warrant against her husband,[25] or defends herself in a

[1] Griffith v. Clarke, 18 Md. 464, 467; Hubbard v. Barcus, 38 Md. 166, 174; Kerchner v. Kempton, 47 Md. 568, 589; Whitmore v. Delano, 6 N. H. 543, 546; First v. Garlinghouse, 53 Barb. 615; Phillips v. Burr, 4 Duer, 113, 114; cases *infra*, n. 51.

[2] Wright, 2 Harr. Del. 49; Templeton v. Crain, 5 Me. 417, 418.

[3] Fox v. Tooke, 34 Mo. 509, 510.

[4] Phillips v. Burr, 4 Duer, 113, 114; Kiddestin v. Meyer, 2 Miles, 295.

[5] Henchman v. Roberts, 2 Harr. Del. 74; Patton v. Stewart, 19 Ind. 233, 237; Button v. Wilder, 6 Hill, 242; First v. Garlinghouse, 53 Barb. 615; Shallcross v. Smith, 81 Pa. St. 132, 133; Stevens v. Dubarry, Minor, 379.

[6] Wallingsford, 6 Har. & J. 485, 489.

[7] Norris v. Lantz, 18 Md. 260, 269; Hall v. Callahan, 66 Mo. 316, 324.

[8] See Kerchner v. Kempton, 47 Md. 568, 588; Travis v. Miller, 55 Miss. 557, 566.

[9] Major v. Symmes, 19 Ind. 117, 118, 119; Porter v. Haley, 55 Miss. 66, 69; King v. Mittalberger, 50 Mo. 182, 185.

[10] Krone v. Linville, 31 Md. 138, 147; Kerchner v. Kempton, 47 Md. 568, 588; Wolf v. Banning, 3 Minn. 202, 204; Collard v. Smith, 13 N. J. Eq. 43, 45.

[11] See Myers v. Griffis, 11 Rich. 560, 564.

[12] Stevens v. Reed, 112 Mass. 515, 517; Porter v. Haley, 55 Miss. 66, 70; Powers v. Potter, 42 N. J. L. 442, 445.

[13] Owen v. Cawley, 36 N. Y. 600, 605.

[14] Major v. Symmes, 19 Ind. 117, 120; Porter v. Haley, 55 Miss. 66, 69; Powers v. Totten, 42 N. J. L. 442, 445; Leonard v. Rogan, 20 Wis. 540, 542.

[15] Powers v. Totten, 42 N. J. L. 442, 445.

[16] See Leonard v. Rogan, 20 Wis. 540, 542.

[17] See Paine v. Farr, 118 Mass. 74, 76; Hall v. Callahan, 66 Mo. 316, 324; Bickford v. Dare, 58 N. H. 185, 186.

[18] See Glover v. Moore, 60 Ga. 189, 192; Keith, 26 Kan. 26, 36; Hollingsworth v. Harman, 83 N. C. 153, 155; Cayce v. Powell, 20 Tex. 767, 771.

[19] Cayce v. Powell, 20 Tex. 767, 771.

[20] Glover v. Moore, 60 Ga. 189, 192.

[21] Hollingsworth v. Harman, 83 N. C. 153, 155.

[22] Porter v. Bank, 19 Vt. 410, 417. See Kimbro v. First, 1 McAr. 65; Coward v. Pulley, 9 La. An. 13; Tucker v. Scott, 3 N. J. L. 955; Howland v. Fort, 8 How. Pr. 505; McIntire v. Chappell, 2 Tex. 378, 379.

[23] Foxwist v. Tremaine, 2 Saund. 212, 213; Kerchner v. Kempton, 47 Md. 568, 588; Beach, 2 Hill, 260; Frazier v. Felton, 1 Hawks, 231, 237; Vick v. Pope, 81 N. C. 122, 126.

[24] Necessaries discussed, Stewart M. & D. §§ 180, 389, 455.

[25] Shepherd v. Mackou, 3 Camp. 326, 327; Stewart M. & D. § 389, or for restitution of conjugal rights, Wilson v. Ford, L. R. 3 Exch. 63.

similar proceeding against her by him,[26] or when she sues, for a separate maintenance,[27] her legal expenses are necessaries for which her husband is liable. So her expenses in bringing or defending a divorce suit, in cases where she had a reasonable ground of action or defense,[28] are held to be necessaries in England,[29] Georgia,[30] Iowa,[31] Kansas,[32] and Maryland;[33] while the contrary is the rule in Alabama,[34] Connecticut,[35] Illinois,[36] Indiana,[37] Kentucky,[38] Massachusetts,[39] New Hampshire,[40] Ohio,[41] Tennessee,[42] and Vermont.[43] In divorce cases the husband is made to pay counsel fees, just as he is to pay alimony.[44]

2.—*The trustee's or next friend's liability.*—The trustee of a married woman's separate property may employ an attorney, and though he is personally bound to compensate him unless there is some agreement that he shall not be so liable,[45] he may repay himself out of the estate.[46] So the reason for the joinder of a next friend with a married woman in her suits is that there may be a party responsible for costs,[47] and in those cases where a married woman sues by next friend he is liable for the counsel fees.[48]

3.—*The wife's liability*, in personam *and* in rem.—At common law, as a general rule, a married woman could make no contract at all,[49] and could not appear by attorney in a suit unless he were appointed by her husband,[50] and therefore her contract to pay counsel fees was absolutely void,[51] and she could not even, according to the better settled rule, ratify such a contract after the dissolution of her marriage.[52] But if an attorney collected moneys belonging to her, he could retain a reasonable part thereof as compensation for his services,[53] though he could not have recovered anything in any suit against her.[54] She could, however, charge her equitable separate estate in equity for fees, just as she could charge it for any other debt of hers,[55] provided that she complied with the rule prevailing in the particular State as to the mode in which the charge had to be made,[56] for example, that the contract was made with express reference to her said estate,[57] or was for its benefit,[58] and provided that the property so charged was property over which she had the power of disposition.[59] Under a statute authorizing a married woman to contract generally, there is no reason why she could not contract for the payment of counsel fees,[60] and when she is authorized to

[26] Warner v. Heeden, 28 Wis. 517, 519.

[27] Williams v. Monroe, 18 B. Mon. 514, 518; Stewart M. & D. § 179.

[28] Handy v. McCurley, 62 Md. —, 19 Cent. L. J. 253; Brown v. Ackroyd, 5 El. & B. 819, 827, 829, 25 L. J. Q. B. 193, 34 Eng. L. Eq. 214, 217.

[29] Ottaway v. Hamilton, L. R. 3 C. P. D. 393, 397, 399; Hooper, 33 L. J. (N. S.) 300, 305; 2 De Gex J. & S. 91; Stocker v. Pattrick, 29 L. T. (N. S.) 507; Wilson v. Ford, L. R. 3 Ex. 63; Rice v. Shepherd, 12 Com. B. (N. S.) 332, 333; Brown v. Ackroyd, 5 El. & B. 819, 827, 829, 25 L. J. (Q. B.) 193, 34 Eng. L. & Eq. 214, 217.

[30] Glenn v. Hill, 50 Ga. 94, 96; Sprayberry v. Merk, 30 Ga. 81, 82.

[31] Porter v. Briggs, 38 Iowa, 166. Compare Johnson v. Williams, 3 Greene, 97, 99.

[32] Gossett v. Patten, 23 Kan. 340, 342.

[33] Handy v. McCurley, 62 Md. —, 19 Cent. L. J. 253, 254.

[34] Parsons v. Darrington, 32 Ala. 227, 255.

[35] Spelton v. Pendleton, 18 Conn. 417, 433; Cooke v. Newell, 40 Conn. 596, 598.

[36] Dow v. Eyster, 79 Ill. 254, 256.

[37] McCullough v. Robinson, 2 Ind. 630.

[38] Williams v. Monroe, 18 B. Mon. 514, 517, 518.

[39] Coffin v. Durham, 8 Cush. 404, 405.

[40] Morrison v. Holt, 42 N. H. 478, 480; Ray v. Adden, 50 N. H. 82, 84, 85.

[41] Dorsey v. Goodenow, Wright, 120.

[42] Thompson, 3 Head, 527, 529.

[43] Wing v. Hurlburt, 15 Vt. 607, 615.

[44] Stewart M. & D. § 389; Dow v. Eyster, 79 Ill. 254, 255.

[45] See Gill v. Carmine, 55 Md. 339, 342.

[46] Noyes v. Blakeman, 3 Sandf. 531, 544.

[47] Harper v. Whitehead, 33 Ga. 138, 144.

[48] Brawner v. Bell, 30 Ga. 334, 335; Baker, 1 Bailey Eq. 165.

[49] Norris v. Lantz, 18 Md. 260, 269.

[50] Fox v. Tooke, 34 Mo. 509, 510; Phillips v. Burr, 4 Duer, 113, 115; Frazier v. Felton, 1 Hawks, 231, 237.

[51] See Drais v. Hogan, 50 Cal. 121, 128; Pierce v. Osman, 75 Ind. 259, 260; Putnam v. Tennyson, 50 Ind. 456, 458; Thompson v. Warren, 8 B. Mon. 488, 491; Porter v. Haley, 55 Miss. 66, 70; Musick v. Dobson, 76 Mo. 624, 625; 43 Am. Rep. 780; Whipple v. Giles, 55 N. H. 139, 140, Wilson v. Burr, 25 Wend. 386, 388; Davis v. Burnham, 27 Vt. 562, 568.

[52] Musick v. Dobson, 76 Mo. 624, 625, 43 Am. Rep. 780; Stewart M. & D., § 469; Stewart H. & W. §§ 366, 368, 463.

[53] Thompson v. Warren, 8 B. Mon. 488, 491.

[54] See Davis v. Burnham, 27 Vt. 562, 568.

[55] Pfirshing v. Falsh, 87 Ill. 260, 262; Major v. Symmes, 19 Ind. 117, 118, 119; Porter v. Haley, 55 Miss. 66, 69; King v. Mittalberger, 50 Mo. 182, 185; Owen v. Cawley, 42 Barb. 105, 118, 36 N. Y. 600, 605; Wilson v. Burr, 25 Wend. 386, 388; Davis v. Burnham, 27 Vt. 562, 568.

[56] Discussed in Stewart, H. & W. §§ 206, 207.

[57] See Major v. Symmes, 19 Ind. 117, 119.

[58] See King v. Mittalberger, 50 Mo. 182, 185.

[59] See Cozzens v. Whitney, 3 R. I. 79, 83; Pierce v. Osman, 75 Ind. 259, 260.

[60] See Worthington v. Cooke, 52 Md. 297, 308; Edwards v. Schoeneman, 104 Ill. 278 283.

contract with respect to her property, a contract for legal services to the same would be valid.[61] So would such a contract be impliedly authorized by a statute securing her property to her separate use and control.[62] So by implication, a statute authorizing her to sue and be sued alone, empowers her to employ an attorney to take charge of her said suits.[63] Whether, when she may under such statutes employ counsel, she binds herself personally or only her property, and whether her liability is to be enforced in equity or at law, are questions relating to procedure on which there is no substantial agreement in the different States;[64] but, in this respect her contracts for counsel fees are governed by the same rules as her other contracts.[65] When a wife is liable for family expenses, how far counsel fees are a family expense must depend on the particular circumstances of the case.[66]

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[61] See Pfirshing v. Falsh, 87 Ill. 260, 262; Owen v. Cawley, 36 N. Y. 600, 605.

[62] Major v. Symmes, 19 Ind. 117, 118; Porter v. Haley, 55 Miss. 66, 69; Powers v. Totten, 42 N. J. L. 442, 445; Leonard v. Rogan, 20 Wis. 540, 542.

[63] Stevens v. Reed, 112 Mass. 515, 517. See Glover v. Moore, 60 Ga. 189, 192; Powers v. Totten, 42 N. J. L. 442, 445.

[64] Compare Major v. Symmes, 19 Ind. 117, 120; Porter v. Haley, 55 Miss. 66, 69; Leonard v. Rogan, 20 Wis. 540, 542.

[65] See Williams v. Huqunin, 69 Ill. 214, 218; Huyler v. Atwood, 26 N. J. Eq. 504, 506; Kronscup v. Rontz, 51 Wis. 204, 218.

[66] Fitzgerald v. McCarthy, 55 Iowa, 702, 705.

## MARINE INSURANCE—USAGE—CONTRACT

### EMERY v. BOSTON MARINE INSURANCE COMPANY.

*Supreme Judicial Court of Massachusetts, January. 1885.*

1. *Marine Insurance—Evidence—Usage to make Application in Writing.*—In an action against a marine insurance company, upon the issue whether a contract of insurance has been made, if the plaintiff, who holds a running policy containing a condition, "no risk to be binding until accepted by the company and indorsed herein," has testified to the making of an oral application for insurance on a particular risk and its indorsement on the policy and to the defendant's assent thereto, it is not competent for the defendant to prove a usage to make such applications in writing, either as tending to show an improbability of the truth of the plaintiff's testimony, or that the oral application, if made, was merely a preliminary negotiation not designed to override the usage.

2. ——. *Running Policy—Oral Acceptance of New Risk.*—A condition in a running policy "no risk to be binding until accepted by the company and indorsed herein" does not preclude the insurer from orally accepting a new risk, subject to all the other provisions of the policy, with an agreement to put it in writing thereafter by indorsing it.

3. ——. *By-Laws—Provision not Restricting Oral Contracts.*—A provision in the by-laws of an insurance company that "in case of the absence, inability or death of the president, policies and other papers shall be signed by two directors," does not exclude the making of oral contracts of insurance by any officer who may have authority, or be held out as having authority, to make such contracts.

4. ——. *Authority of Secretary to make Contract Inferred from what Circumstances.*— Evidence that the secretary of an insurance company was, after the president, the chief officer in charge; that the president sometimes signed policies in blank, and left them in order that the secretary might make contracts and deliver the policies, and that the president supposed that the secretary had received applications and made indorsements on policies, that he [the president] did not intend that business should, or think it did stop, in his absence, would authorize the jury to infer authority on the part of the secretary to make a contract of insurance.

5. ——. *Case in Judgment.*—The plaintiff having a running policy issued to him by the defendant company, containing the condition "no risk to be binding until accepted by the company and endorsed herein," testified that he told the secretary to "enter up $10,000 on the cargo of the Bridgport, and I will bring in the policy and have it entered up after the invoice arrives," and that the secretary said "all right." This the latter denied. *Held*, 1. That it was for the jury to say what the conversation meant, and whether a contract was thereby proved. 2. That it was also for them to say what would be a reasonable time after the arrival of the invoices to bring them to the defendant. 3. That if, within such time, the defendant disclaimed having any contract with the plaintiff, there was no occasion for him afterwards to bring the invoices.

ALLEN, J., delivered the opinion of the court:

The plaintiff sought to escape from the effect of the provision in the policy, "no risk to be binding until accepted by the company and indorsed herein," by proof of an oral contract; and the defendants, while denying that such oral contract has been made, sought to confirm their view by calling a witness familiar with the customs and usages of the business of marine insurance in Boston, and asking him the question "whether there is any usage as to the matter of making written applications for marine insurance." The question was excluded; and the grounds upon which the defendant urges its competency, are that the evidence of the usage would have tended to show an improbability of the truth of the plaintiff's testimony as to the making of oral applications for the insurance, and that the oral applications, if made, were mere preliminary negotiations, and not designed to override the usage. The bill of exceptions contains no statement of what the defendant offered or expected to show by this witness, or that they excepted to the exclusion of the testi-

mony; but we do not dwell upon these considerations, because we are of the opinion that evidence of a usage to require written applications would be incompetent, for the purpose of meeting evidence on the part of the plaintiffs tending to prove an oral contract of insurances. The fact that contracts of insurance are usually in writing, and expressed in the form of policies, is a matter of common knowledge, and needs no witness to prove it, and it might have been, and doubtless was assumed on the trial of the present case, and indeed this appears by implication from the whole course of the bill of exceptions.

But it is also well settled, and it is now too late to question the doctrine, that an oral contract of insurance may be valid. Sanborn v. Firemen's Ins. Co., 11 Gray, 448. As was said in that case, p. 453, "it is not easy to see the force of reasoning which would infer that, because parties usually make their contracts in one way, it would be void when they choose to make it in another, equally good at common law, and not prohibited by any statute. See also Relief Ins. Co. v. Shaw, 94 U. S. 574. A usage that an oral contract, if made, is considered invalid, would be plainly repugnant to law and void. In the present case, the evidence of usage was offered, not in aid of the construction of a contract, but to support the position that no contract whatever had been made. If a contract had in point of fact been made as alleged, it was of no consequence whether it was according to general usage or not.

The defendant's own usage sufficiently appeared from the provision in the policy already copied, and its by-laws were in evidence, with a provision that "the President shall receive applications for insurance; fix the rates of premium, and the sums to be taken; sign all policies," etc. The plaintiff's case proceeded with a full recognition of the fact that it was necessary for him to show a contract not according to the usual course of the defendants dealing; and direct testimony was introduced on both sides, upon the precise point whether an oral contract of insurance had been made or not. There is nothing to show that any restriction was put upon any inquiry as to the defendant's own usage. It is no legitimate confirmation of the defendant's position, under such circumstances, to show that other insurance companies usually require application for marine insurance to be in writing, as a condition of making the contract. This fact if proved, would have no legal tendency to show that these parties did not make a contract orally. The plaintiff was not bound in law by such custom if it existed, whether other parties were or were not in the habit of making their contracts in a particular form was nothing to him. An oral contract was lawful, and the evidence was properly confined to the question whether this particular oral contract had been made as testified by the plaintiff, without going into the general inquiry whether other parties were accustomed to make such contracts. The issue being, whether a particular contract had or had not been orally made, as it might lawfully be, evidence that contracts in that form were unusual, was not admissible to meet and control evidence that such a contract had in fact been made. To hold otherwise would be to extend the office of a usage beyond any known precedent. On the other hand, in Sanborn v. Firemen's Ins. Co., 16 Gray, 448, which was an action upon an oral contract of insurance, the book of entries of the defendant's agent, in which the alleged contract was not entered, was offered in evidence to corroborate his testimony that no contract had been made, and was excluded. And a point settled in Russell v. Kimball, 5 Allen, 356, is in principle precisely like the one before us. In that case, the plaintiff, a master mariner, purchased of the defendant by a written contract and a bill of sale one-twelfth of a vessel then undergoing repairs. It was in dispute, and there was a direct conflict in the evidence, whether the parties agreed that the title should not vest in the plaintiff till the repairs were complete, and whether the defendant promised to pay for the repairs. A ship broker of long experience was allowed to testify, at the hearing before a master in chancery, "that it was very unusual for a master to buy a master's interest in a vessel undergoing repairs, and that it would be an unheard of case to sell such an interest to a master, and he to pay his contributory share of the expenses of the repairs." The court say, in reference to this: "The admission of the testimony as to a usage or custom in the purchase of master's interests in vessels was incorrect, and a finding based in any degree upon it would be erroneous. The evidence did not tend to prove any custom valid in law." p. 365. It may also be added, as further reasons for holding the exclusion of the testimony in the present case correct, that there was no offer to show that the plaintiff was acquainted with the supposed usage, or that the usage related to the indorsement of particular risks upon open policies as well as to the original contract of insurance, nor can we know that the defendants expected to prove that the custom was not only general, but universal and uniform. Porter v. Hills, 114 Mass. 106; Scudder v. Bradbury, 106 Mass. 422; Howard v. Great Western Ins. Co., 109 Mass. 384.

The defendants asked the court, at the close of the evidence, to rule that, upon the evidence, the plaintiff could not maintain this action; which the court refused to. In support of this request, the defendants have argued to us that, under the provision of the open policy already cited, an acceptance of the risk by the company, and an indorsement of it on the policy, are made conditions precedent to the commencement of the risks and it is urged that the language used is widely different from that used in Carver Co. v. Manuf. Ins. Co., 6 Gray, 214, and Kennebec Co. v. Augusta Co., Ib. 214. But we think that there can be no doubt that an oral agreement for a present insurance, according to the terms of a written and

existing open policy, which insurance is to continue until it is superseded by the entry of the risk upon the policy, must mean, according to those terms so far as they are applicable to such an oral agreement; and if such policy contains a provision that no risk shall be binding until indorsed thereon, such provision is annulled by the later contract, or is not included in it. The oral agreement necessarily implies that such condition is excepted out of it, and is not a part of it. The circumstance that the policy, as issued, contains such a condition precedent, does not preclude the company from orally accepting a new risk, subject to all the other provisions of the policy, with an agreement to put it in writing thereafter, by indorsing it upon the policy. There is no legal difficulty in such a construction. Parties to an existing written agreement may, by a new contract not in writing, annul it, or add to it or subtract from it, or vary or qualify its terms, and thus make a new contract, which is to be proved partly by the written agreement, and partly by the subsequent verbal terms engrafted upon what will then be left of the written agreement. 1 Chitty Con. (11th Amer. ed.) 154, 155; 1 Greenl. Ev. §§ 302, 304. Illustrations of the application of this rule, pertinent to the present case, are numerous. Goodrich v. Longley, 4 Gray, 383; Kennebec Co. v. Augusta Co., 6 Gray, 204; Commercial Ins. Co. v. Union Ins. Co., 19 How. 318; Rathburn v. City Ins. Co., 31 Conn. 194; Ins. Co. v. Norton, 96 U. S. 234. It is as if the insurance company through its officers should say "we will take the risk now and put it upon the policy;" and the case does not fall within the principle of Batchelder v. Queen's Ins. Co., 136 Mass. 449, and other similar cases, where it was sought to prove an oral agreement contradicting the writing, and contemporaneous with it.

The defendants also contend that there was no sufficient evidence of Lord's authority to make a contract of insurance in the absence of the president, and on this ground except to the admission of the evidence of the alleged contract between the plaintiff and Lord. The provision of the by-laws that, "in case of the absence, disability or death of the president, policies and other papers shall be signed by two directors," relates only to the formal execution of papers which require signing, and does not exclude the making of oral contracts of insurance by any officer who may have authority, or be held out as having authority to make such contracts. Sanborn v. Firemen's Ins. Co., 16 Gray, 454; Commercial Ins. Co. v. Union Ins. Co., 19 How. 318, 321; Ins. Co. v. Colt, 20 Wall. 566; Eames v. Home Ins. Co., 94 U. S. 627; Walker v. Metropolitan Ins. Co., 56 Maine, 371; Davenport v. Peoria Ins. Co., 17 Iowa, 276.

In the present case the plaintiff testified to certain conversation with Lord, the secretary, which included the contract relied on. He added that Mr. Fuller was not present at the time, and that this talk was with Lord alone; that a few days before he had told Littlefield, the clerk, that he wanted him to enter up $10,000 on this cargo, to which Littlefield answered "all right." He also testified to an earlier conversation with Fuller, the president, in which the latter said that defendants would take the cargoes of the Bridgport. Mr. Fuller himself testified that Lord was secretary and chief officer in charge, after himself, the vice-president being in New York; that he (Fuller) sometimes signed policies in blank and left them in order that Lord might make the contract and deliver the policy; that probably Lord had received applications and made indorsements upon policies of this description in his (Fuller's) absence, though he did not remember any particular case; that it was his belief that it had been done; that he presumed people had been in and had indorsements when he was away; that he had never forbidden the secretary to make such indorsements, and, so far as he knew, nobody had ever forbidden it, though he had known of it all through the time the company had been in existence; that he did not think the business of the company stopped when he was gone, and did not intend that it should; that all the directors were in the habit of dropping in at the office, but "didn't pretend to have much to do about the business, except we asked their advice sometimes." Mr. Lord also testified that while the office was open for business, they intended to have some one there to attend to business; that for two or three years he had been in the habit of taking risks when Mr. Fuller was away, subject to his approval on his return; that (in such cases) he completed the contract with the assured in the absence of Mr. Fuller, and could not name an instance in which Mr. Fuller had revoked or changed a policy issued or risk taken by him, and that this practice had been known in the office to all the clerks. From this testimony the inference might properly be drawn by the jury that Lord had the requisite authority, express or implied, to enter an indorsement upon the open policy, and to make a binding oral agreement to do so, and meanwhile to carry the risk. Relief Ins. Co. v. Shaw, 94 U. S. 574, 579; Smith v. Hull Glass Co., 8 C. B. 668; 11 Id. 897, 927; Allard v. Brown, 15 C. B. (N. S.) 468.

The defendants further contend that, even supposing Lord's authority sufficient, the words which the plaintiff puts into his mouth, do not necessarily or naturally imply an intention on his part to waive or annul the condition precedent contained in the policy. But, in the opinion of a majority of the court, the jury might properly be left to say what the conversation meant, in view of all the circumstances. If the jury gave credit to the plaintiff's testimony, we cannot say, as matter of law, that no contract was proved. Finally, it is urged that by the plaintiff's failure to bring in the invoices, or the information contained therein, to the defendants, within a reason-

able time after their arrival, the contract was not completed, and the defendants are not liable. But it was for the jury to determine whether September 12th was a reasonable time, and if they found that the defendants then disclaimed having any contract with the plaintiff in respect to this cargo, there was no occasion for him to bring in the invoices afterwards.

Exceptions overruled.

## ASSIGNMENT OF CAUSE OF ACTION FOR PERSONAL INJURY IN ANOTHER STATE.

### VIMONT v. CHICAGO & N. W. R. CO.*

*Supreme Court of Iowa, April 8, 1885.*

1. *Action for Personal Injury—Assignment of Cause of Action—Law of State where Assignment Executed.*—A party to whom a claim for damages for personal injuries caused by the negligence of a railroad company in Iowa has been assigned, may maintain an action thereon in the courts of this State, although such assignment was executed and delivered in another State, by the law of which it would be void.

2. ——. *Assignability of Cause of Action for Tort.*—Vimont v. Chicago & N. W. R. Co., 21 N. W. Rep. 9, followed as to validity of assignment.

Appeal from Polk circuit court.

Plaintiff, as assignee of one Darby Carr, brings this suit to recover damages for a personal injury sustained by said Darby Carr, while in defendant's employ as a laborer on a gravel train, and which was occasioned, as it is alleged, by the negligence of his co-employees. This appeal is from the order of the circuit court sustaining a demurrer to certain counts of defendant's answer.

*N. M. Hubbard* and *Whiting S. Clark*, for appellant. *Nourse & Kauffman*, for appellee.

REED, J., delivered the opinion of the court: It is alleged in the third paragraph of the answer, that the assignment by Carr to plaintiff of the claim on which the action is brought, was executed, delivered, and accepted by plaintiff, and its acceptance took effect in the State of Illinois, and that by the common law, which is in force in that State, the assignment of said cause of action is void. The question raised by the demurrer to this paragraph, is whether the plaintiff is precluded by these facts from recovering on the cause of action sued on. The assignment under which plaintiff claims is set out in the petition, and it is a cause of action which is alleged to have arisen under the laws of this State in favor of an employee of the defendant on account of a personal injury sustained by him in consequence of the negligence of a co-employee.

It may be conceded for the purposes of this case, we think, that a claim for damages arising out of a personal tort, and having its origin where the common law is in force, is not assignable before being reduced to judgment. The ground upon which it is held that such claim is not assignable, is, that it is a mere personal claim in favor of the injured party, and that it does not become part of his estate, or descend to his representatives, but terminates at his death; and consequently it has no value which can be so estimated as to form a consideration for a sale, and there is in it no element of property to make it the subject of a grant or assignment. See Rice v. Stone, 1 Allen, 566; People v. Tioga Common Pleas, 19 Wend. 73. The contract of assignment of such claim between parties otherwise competent to contract is void at common law, then, not because of any incapacity of the parties to enter into the contract, but because the claim itself is not the subject of contract. Under the statutes of Iowa, however, such claims are given a character entirely different from that sustained by them when arising under the common law. They are not merely personal claims in favor of the parties sustaining the injuries, and they do not terminate with their death, but become part of their estates and descend to their representatives, and actions thereon may be maintained by the representatives, Code, §§ 2525-2527; Carson v. McFadden, 10 Iowa, 91; McKinley v. McGregor, Id. 111; Shafer v. Grimes, 23 Iowa, 550. They are also assignable under the laws of this State. Weire v. City of Davenport, 11 Iowa, 49; Gray v. McCallister, 50 Iowa, 497.

If Carr, plaintiff's assignor, had a valid claim for damages on account of the alleged injury, such claim had the qualities of a property right or interest. It constituted a part of his estate, and was capable of being transferred within the State by assignment, and at his death it would have descended to his representatives, and his assignee or representative could have maintained an action in his own name for its enforcement. It seems to us that the mere carrying of this claim into another State could not have the effect to change its character or take from it any of its qualities, but that it would retain its properties notwithstanding the removal of the person in whose favor it arose to another State or county; and that as it had the properties which rendered it assignable imparted to it by the laws under which it arose, it would retain those properties when taken beyond the jurisdiction of those laws, and would be assignable anywhere.

The other questions raised by the demurrer are the same as those determined in Vimont v. Chicago & N. W. R. Co., 21 N. W. Rep. 9, and the ruling of the circuit court thereon is in accord with our holding in that case. Affirmed.

ADAMS, J., dissenting.

* S. C., 22 N. W. Rep., 906.

## MARRIED WOMAN'S DEED — HUSBAND MUST BE PRESENT AT THE SIGNING.

### MILLER v. RUBLE.*

*Supreme Court of Pennsylvania, Nov. 13, 1884.*

Under the Pennsylvania Act of Feb. 24, 1770, which declares that when husband and wife desire to convey the estate of the wife in any lands, it shall be lawful for them "to make, seal, deliver and execute a deed for the same," a deed purporting to convey the lands of a married woman, is void unless *signed* by the husband; for a deed is not *made* until signed; *sealing* and delivering are not sufficient.

Error to the Court of Common Pleas of Washington county.

Ejectment brought by William Ruble and Elmira Ruble, his wife, in right of the wife, against James M. Miller for a tract of land containing about eighty-three acres and twenty-seven perches. It was sought to defeat the plaintiff's recovery for the reason that prior to the bringing of her ejectment, Mrs. Ruble had conveyed her title to her brother, Thomas Horton, from whom Miller deduced title. The deed from which this conveyance was made is as follows:

*This Indenture*, made the twenty-seventh day of September, in the year of our Lord one thousand eight hundred and sixty-seven, between William Fisher and Mary Ann, his wife, William L. Ruble and Elmira, his wife, all of East Bethlehem township, Washington county, State of Penna., and Christopher Horton and Sarah Ellen, his wife, of West Pike Run township, county and State aforesaid, of the first part, and Thomas Horton, of East Bethlehem township, county and State aforesaid, of the second part.

Then follows the recitals of facts, that Aaron Horton being seized of a tract of land containing 186 acres, died intestate, leaving a widow and four children, Thomas, Mary Ann, intermarried with William Fisher, Elmira, intermarried with William L. Ruble, and Christopher, that said tract of land descended to these four children as tenants in common, and that they had arrived at legal age to convey their interests. After a covenant of special warranty the deed concludes:

In testimony whereof, the said parties of the first part have hereunto set their hands and seals the day and year first above written.

| | | |
|---|---|---|
| Signed, sealed and delivered in presence of | MARY ANN FISHER, | [SEAL.] |
| | ELMIRA RUBLE, | [SEAL.] |
| | CHRISTOPHER HORTON, | [SEAL.] |
| J. W. QUAIL, | SARAH ELLEN HORTON, | [SEAL.] |
| W. H. DALBEY, | | [SEAL.] |
| | | [SEAL.] |

The certificate of acknowledgment sets forth the names of all the parties of the first part, and that they severally acknowledged the deed in substantial conformity with the requirements of the Act of Assembly.

This deed the defendant offered in evidence to prove that the title of the plaintiffs vested in Thomas Horton. This was objected to by the plaintiffs, because at the time the deed was executed Elmira Ruble was a married woman, being the wife of William L. Ruble, it purporting to convey her separate estate, and showing also that her husband did not join in the execution. This objection was sustained by the court below.

Verdict and judgment thereon for plaintiffs. Defendant took this writ of error, assigning for error the refusal of the court to admit the deed above described.

The question determined is: Is *signing* by a husband an essential part of the execution of such a deed?

*Messrs. Dougan & Todd*, for plaintiff in error; *Contra*, *Messrs. Boyd Crumrine* and *John H. Murdoch*.

MERCUR, C. J., delivered the opinion of the court:

It is true at an early day in England, signing was not considered essentially necessary to the validity of a deed. It is not stated as one of the things necessarily incident to a deed at common law: Co. Litt. L., 1, c. 5, sec. 40, 35*b*. A due sealing thereof was deemed a sufficient execution. This, however, was by reason of a very general inability to read or write. 1 Reeves' Hist. of Eng. Law, 184, in note. In 1 Blackstone's Com., 305, it is said to be requisite that the party, whose deed it is, should seal, and now in most cases, I apprehend, should sign it also. He proceeds to state that, under Saxon rule, seals were not of much use in England. Their method, for such as could write, was to subscribe their names, and whether they could write or not, to affix the sign of the cross. On the conquest by the Normans they introduced waxen seals only, instead of the English method of writing their names and signing with the sign of the cross. These seals, however, generally, had specific devices to distinguish them from each other.

The statute of 29 Charles II., and the first section of our act of 21st March, 1772, indicated a necessity that all transfers of land should be put in writing and be signed by the parties making the same. This was deemed necessary for the prevention of frauds and perjuries. Our act makes no reference to a seal for the purposes therein mentioned, but requires the writing to be signed.

It was, however, held more than one hundred years ago, that the signing of a deed was a material part of the execution thereof, and that the seal had become a mere form, and a written or ink seal, as it was called, was good. McDill v. McDill, 1 Dall. 64. The sufficiency of such a form of seal, when the deed is signed by the maker, was affirmed in Long v. Ramsey, 1 S. & R., 72. It is true in Maule v. Weaver, 7 Barr, 329, Mr. Chief Justice Gibson did say that he did not entirely concur in what was said in those cases that the signing of a deed was the material part of its execution, yet he admitted it to be the most

* S. C., 15 Pittsb. Leg. Jour. N. S. 205.

powerful evidence of the joint or separate ensealing thereof. In that case, however, the question was whether covenant could be maintained against the grantee in a deed, when he had neither signed nor sealed it, but it concluded, "in witness whereof, the said parties have hereunto interchangeably set their hands and seals the day and year first above written," and was signed and sealed by the grantor alone.

In Leggett v. Long, 7 Harris, 499, a treasurer's deed was held sufficiently executed, where he had omitted to write his signature near the printed impression of a seal, but had put it on the deed, to a receipt for the taxes and costs for the bond, for the surplus purchase money, and had also acknowledged the deed in open court, which acknowledgment was entered on the records of the court and duly certified on the deed.

Cases may undoubtedly be found in which judges of this court have cited English authorities to prove that at common law, irrespective of statute, signature was not essential to a deed. Hoffman v. Bell, 11 P. F. Smith, 444, cited by counsel for plaintiff in error, is one of them. That case, however, was not ruled on the validity of a deed sealed and not signed, but on the fact that the evidence failed to prove that any deed had been delivered or executed.

The great industry and careful search of counsel have not resulted in his being able to cite a case since McDill v. McDill, in which it was held by this court, on a direct presentation of the question, that a deed professing to convey land was sufficiently executed without any signature of the vendor. On the contrary, in Watson v. Jones, 4 Norris, 117, McDill v. McDill is cited approvingly by Mr. Justice Gordon. The recognition of any rule which dispenses with the necessity of the signature of the grantor would be fraught with great mischief. Aided by a pliant justice of the peace, or by a false personation before an honest one, it would provide a convenient way to rob a man of his land without the trouble and danger of forging his signature.

The case now before us relates to the question of what is necessary to make a valid conveyance of the real estate of a married woman. This is to be determined by the statute, without which it could not be done.

Section 2 of the Act of 24th February, 1770, declares when husband and wife desire to convey the estate of the wife in any lands, it shall be lawful for them to make, seal, deliver and execute a deed for the same, and after such execution to appear before a judge of the Supreme Court or justice of the common pleas of the county in which the land lies and acknowledge the same. This act requires both husband and wife to join in the conveyance to pass the real estate of the latter. Its directions are imperative. Trimmer v. Heagy, 4 Harris, 484. What specific acts must they both do? The statute answers, "make, seal, deliver, execute and acknowledge the deed." Sealing and delivering are not the only requisites which must precede the acknowledgment. They must first make the deed. This clearly imports the signing thereof. Until that is done it would be a forced construction of this language to say they had made a deed. The manifest meaning of this word, in the connection in which it is used, is that the deed shall be duly prepared, and be signed by them. The sealing is referred to as a separate act.

The Act of 1848 does not repeal or change the Act of 1770, so as to dispense with the necessity of both joining in the deed to convey the real estate of the wife. Peck v. Ward, 6 Harris, 506; Ulp v. Campbell, 7 Id. 361. The Act of 1848 confers no power upon a *feme covert* to make a valid conveyance of her real estate unless her husband joins in the deed. Thorndell v. Morrison, 1 Casey, 326; Stoops v. Blackford, 3 Id. 213; Glidden v. Strupler, 2 P. F. Smith, 400; Dunham v. Wright, 3 Id. 167. She has no capacity to contract for the sale of her real estate, nor to convey it otherwise than in the precise statutory mode conferring the power. Irones v. Templeton, 14 Norris, 262.

While several acts since that of 1770 have conferred upon other officials the power of taking the acknowledgment of a deed conveying the real estate of a wife, yet no one has changed the form of its execution nor dispensed with the necessity of its being made by both husband and wife.

As the deed offered in evidence showed Mrs. Ruble to be a married woman when it was executed, and her husband did not unite with her in its execution, it was insufficient to pass her real estate, and the learned judge committed no error in rejecting the evidence.

Judgment affirmed.

## INJURIES FROM SURFACE WATER.

### KANSAS CITY, ETC. R. CO. v. RILEY.

*Supreme Court of Kansas, April 10, 1885.*

The doctrine of the common law with respect to the obstruction and flow of mere surface water prevails, as a general rule, in this State. Railroad Co. v. Hammer, 22 Kas. 763; Gibbs v. Williams, 25 Kas. 214. This rule has some exceptions, and one is noticed by this court in Palmer v. Waddell, 22 Kas. 352. *Held*, however, that upon the facts disclosed upon the trial, this case is not within the exception therein noticed.

HORTON, C. J., delivered the opinion of the court:

This was an action to recover damages resulting from obstructing the flow of surface water from its alleged natural course. The vital question in the case is, whether, under the evidence, the plaintiff below was entitled to recover damages. We think not. The common law, as modified by constitutional and statutory law, judicial

decisions and the condition and wants of the people, is in force in this State in aid of the general statutes. Therefore, the doctrine of the common law, with respect to the obstruction and flow of mere surface water, prevails, as a general rule. Under this rule, surface water is within the control of the owner of any land upon which it falls, or over which it flows; he may use all that comes upon his own, or decline to receive any that falls on his neighbor's land. Railroad Co. v. Hammer, 22 Kas. 763; Gibbs v. Williams, 25 Kas. 214.

"The simple fact that the owner of one tract of land raises an embankment upon it which prevents the surface water falling and running upon the land of an adjoining owner from running off said land and causes it to accumulate thereon to its damage, gives to the latter no cause of action against the former." Railroad Co. v. Hammer, *supra*.

In Palmer v. Waddell, 22 Kas. 352, the general rule applicable to surface water was held not to apply in an exceptional case. This exception was favorably referred to in Bowsby v. Speer, 2 Vroom. 351, and Hoyt v. City of Hudson, 27 Wis. 656. The doctrine of the common law with respect to the obstruction and flow of mere surface water is not only in force in England, but in Connecticut, Indiana, Massachusetts, Missouri, New Jersey, New Hampshire, New York, Vermont and Wisconsin. In a late case decided in Missouri, it was said: "We feel constrained to recognize the common law doctrine on this subject so often and repeatedly approved by this court without division in all its earlier and later decisions, as still the law in this State. The rule of the common law as expounded in the numerous decisions quoted above, we think, after all, best promotes and conserves the varied and important interests of both the public and private individuals incident to and growing out of this question. It permits and encourages public and private improvements, and, at the same time, restrains those engaged in such enterprises from unnecessarily or carelessly injuring another. * * * * A strict and literal application of the doctrine of the civil law would, we think, in many places and in large districts of country, materially retard, if not utterly destroy, many useful and profitable improvements, pursuits and enterprises besides railroading." Abbott v. Railroad Co., S. C. of Mo., Oct., 1884, MSS. See also Lessard v. Stram, 20 Cent. L. J. 231; Barkley v. Wilcox, 86 N. Y. 140; s. c., 24 Alb. L. J. 453-454.

The rule of the common law seems to be in force in Pennsylvania, Iowa, Illinois, California, Louisiana, and is referred to with approval in Ohio. In Pennsylvania, however, the civil law does not seem to apply to house lots in towns and cities. Bentz v. Armstrong, 8 W. & S. 40; and in Livingston v. McDonald, 21 Iowa, 160, the court in an opinion by Dillon, J., after stating the civil law doctrine, say: "That it may be doubted whether it will be adopted by the common law courts of this country so far as to preclude the lower owner from making in good faith improvements which would have the effect to prevent the water of the upper estate from flowing or passing away." We do not think that the evidence before the trial court brings the case within the exception noted in Palmer v. Waddell, *supra*. It is apparent to us that the facts in the case of Gibbs v. Williams, 25 Kas. 215, are more nearly similar to those testified to on the trial than disclosed in the record of Palmer v. Waddell. Plaintiff below owned and occupied lot ten in Williams' addition to Emporia, consisting of about an acre of land. He had lived upon it with his family fifteen years. Upon the lot he had a small house, stable, chicken-pen, hog-pen and cave; also, apple-trees, cherry-trees, peach-trees, pear-trees, grape-vines, etc. There was no hilly region or high bluffs around the lot. The land near by was rolling prairie. Through the lot in question there was a depression through which surface water from adjacent land found its way. Some of the witnesses called the depression a "draw," others a "ravine," and again others a "hollow—a drain." The jury found that there was no gorge or ravine in the plaintiff's land, and while in one finding they said that "there was a well-defined water channel cut and worn by the flow of water," this is fully explained in another finding, in which they said "that the channel was through the entire premises about thirty feet wide, with no abrupt banks," and the "water course no more than is to be seen on most of the farms in Kansas." There was no living or running water through the depression. The water flowing through or over the lot was a temporary accumulation of rain falls, or caused from melting snow. The depression testified to by some as a channel or water course, was simply a passage way for face water. Where the land was not actually cultivated, grass and weeds, in summer, grew in the so-called water course. Doubtless, any one looking might at times perceive that there was a passage-way over the lot for surface water. The amount of land drained over the plaintiff's lot was only between thirty-five and forty acres, and there was no such water course, with banks and channels, as testified to in Palmer v. Waddell.

* * * * * *

To sustain the instruction of the court below concerning the obstruction and flow of mere surface water and to permit the plaintiff to recover upon the evidence in the record, would extend the case of Palmer v. Waddell. That is an extreme case, and is limited to surface water from hilly regions or high bluffs, draining considerable tracts of land through a gorge or ravine, for such a flow as to make a definite or natural channel. The cases of Gibbs v. Williams, *supra*, and Railroad Co. v. Hammer, *supra*, decided subsequently to Palmer v. Waddell, show that the terms of that decision were never intended to be broadened.

This disposes of the case, because the demurrer to the evidence should have been sustained.

The judgment of the district court will be reversed and cause remanded for further proceedings, in accordance with the views herein expressed.

## WEEKLY DIGEST OF RECENT CASES.



1. APPEAL TO U. S. SUPREME COURT—*Five Thousand Dollar Limit—Measure of Value in Condemnation Cases.*—The value of the matter in litigation in a dispute over the assessment of the jury of condemnation is the difference between such assessment and the value of the entire property, nothing to the contrary effect appearing in the record, and if such difference amounts to over $5,000, the controversy may come within the law giving the Supreme Court appellate jurisdiction. *East Tennessee etc. R. Co. v. Southern Tel. Co.*, Sup. Ct. U. S. Nov. 24, 1884; 5 S. C. Rep. 168.

2. —— *Removal of Cause—United States Court Succeeds only to Powers of State Court.*—The courts of the United States, on removal of a proceeding from a State court, are clothed with no greater powers in the premises than the courts of the State would have possessed had their jurisdiction been preserved. It follows that, as an appeal from a probate court of a State to the State circuit court or Supreme Court would not have operated to prevent a telegraph company from taking possession of certain property appropriated, and erecting its wires pending the appeal, the *supersedeas*, in a writ of error from the Supreme Court of the United States to a United States circuit court, should be limited in the same way. *Ibid.*

3. ATTACHMENT—*Fraudulently Contracting Debt—Intent—Evidence of Defendant does not Necessarily Outweigh the Circumstances of the Case.*—Upon the question of the intent with which an act is done, the party doing the act may testify directly; but his direct negative testimony that the intent was not fraudulent, does not necessarily outweigh the evidence of facts and circumstances tending to prove a fraudulent intent. *Anderson v. Wehe*, Sup. Ct. Wis. March 3, 1885; N. W. Rep. 584.

4. ATTORNEY—*Argument Prejudicial.*—An attorney will not be permitted, in the argument of a case to the jury, to make assertions or insinuations of the existence of facts not in evidence. If he do so the verdict may be set aside; but to authorize the setting aside of the verdict, the statements must have been of such a character as may reasonably be supposed to have influenced the jury. *Festner v. Omaha, etc. R. Co.*, Sup. Ct. Neb. March 11, 1885; N. W. Rep. 557.

5. CHINESE IMMIGRATION—*Acts of May 6, 1882, and July 5, 1884.*—The fourth section of the Act of Congress, approved May 6, 1882, c. 126, as amended by the act of July, 5, 1884, c. 120, prescribing the certificate which shall be produced by a Chinese laborer as the "only evidence permissible to establish his right of re-entry" into the United States, is not applicable to Chinese laborers who, residing in this country at the date of the treaty of November 17, 1880, departed by sea before May 6, 1882, and remained out of the United States until after July 5, 1884. *Chew Heong v. United States*, Sup. Ct. U. S., Dec. 8, 1884; 5 S. C. Rep. 255.

6. CONSTITUTIONAL LAW—*Regulation of Commerce—Chinese Immigration—Act of August 3, 1882.*—The Act of Congress of August 3, 1882, "to regulate immigration," which imposes upon the owners of steam or sailing vessels, who shall bring passengers from a foreign port into a port of the United States a duty of fifty cents for every such passenger not a citizen of this country, is a valid exercise of the power to regulate commerce with foreign nations. *Edye v. Robertson*, Sup. Ct. U. S., Dec. 8, 1884; 5 S. C. Rep. 247.

7. —— *Effect of Previous Decisions of Supreme Court.*—Though the previous cases in this court on that subject related to State statutes only, they held those statutes void on the ground that authority to enact them was vested exclusively in Congress by the constitution, and necessarily decided that when Congress did pass such a statute, which it has done in this case, it would be valid. *Ibid.*

8. —— *Object of Tax.*—The contribution levied on the ship-owner by this statute is designed to mitigate the evils incident to immigration from abroad by raising a fund for that purpose, and it is not, in the sense of the constitution, a tax subject to the limitations imposed by that instrument on the general taxing power of Congress. *Ibid.*

9. —— *Uniformity of Taxation.*—A tax is uniform, within the meaning of the constitutional provision on that subject, when it operates with the same effect in all places where the subject of it is found, and is not wanting in such uniformity because the thing taxed is not equally distributed in all parts of the United States. *Ibid.*

10. —— *Treaty—Effect of.*—A treaty is primarily a compact between independent nations, and depends for the enforcement of its provisions on the honor and the interest of the governments which are parties to it. If these fail, its infraction becomes the subject of international reclamation and negotiation, which may lead to war to enforce them. With this judicial courts have nothing to do. *Ibid.*

11. —— *Private Rights—Supreme Law of the Land.*—But a treaty may also confer private rights on citizens or subjects of the contracting powers which are of a nature to be enforced in a court of justice, and which furnishes a rule of decision in such cases. The constitution of the United States makes the treaty, while in force, a part of the supreme law of the land in all courts where such rights are to be tried. *Ibid.*

12. —— *Effect of Acts of Congress.*—But in this respect, so far as the provisions of a treaty can become the subject of judicial cognizance in the courts of the country, they are subject to such acts as Congress may pass for their enforcement, modification, or repeal. *Ibid.*

13. COUNTY SUBSCRIPTION TO RAILROAD BONDS—*Suit by Tax-Payers to Test Authority of County.*—Suit brought by citizens and tax-payers of a county to test the validity of a subscription to railroad stock made by the county, and the authority of the county court to bind the county to pay the bonds, which it was proposed to issue for the subscription, the county itself, through its proper officers, being party in the suit, is, in effect, the same as a suit brought for such purpose by the county itself. *Scotland County v. Hill*, Sup. Ct. U. S., Nov. 10, 1884; 5 S. C. Rep. 93.

14. ——. *Evidence—Notice of Pendency of a Suit Affecting Negotiable Securities.*— Purchasers of negotiable securities are not charged with constructive notice of the pendency of a suit affecting the title or value of the securities; but in defense of an action brought by such a purchaser against a county to recover upon bonds alleged to have been issued by it, it is proper to introduce evidence going to show that the plaintiff or his assignor had actual notice of a suit pending, affecting such bonds before their purchase by him. *Ibid.*

15. ——. *Offer of Testimony—Rejection of Same—Presumption Therefrom.*—If the trial court has doubts about the good faith of an offer of testimony, it can insist upon the production of the witness, and upon some attempt to make the proof, before it rejects the offer; but if it does reject, and allows a bill of exceptions, which shows that the offer was actually made and refused, and there is nothing else in the record to indicate bad faith, an appellate court must assume that the proof could have been made, and govern itself accordingly. *Ibid.*

16. ERROR.—*On one of Several Issues where there is a General Verdict.*—Where a defendant files several pleas to the declaration of the plaintiff, on which issues are joined, and a general verdict is found by the jury in favor of defendant, if, upon any one issue, error was committed, either in the the admission of evidence or in the charge of the court, such verdict, on writ of error, cannot be upheld. *Maryland v. Baldwin*, Sup. Ct. U. S., Dec. 15, 1884; 5 S. C. Rep. 278.

17. FRAUD.—*Sale of Land by Joint Owner as Agent—Preference as to Himself in Price Received.*—A party selling a piece of land of which one-half only is his, commits no fraud on the other owners by taking from the purchaser for his part a price higher than what he requires for the rest, if, previously to the execution to him of a power to sell, procured without fraud, he stated *bona fide* to such owners his intention so to ask a higher price for his part, and received their consent to his doing so. *Ranney v. Barlow*, Sup. Ct. U. S., Nov. 3, 1884; 5 S. C. Rep. 104.

18. LIQUORS.—*Wholesale Dealers.*—The ordinance of the city of Omaha made it the duty of the city marshal, on the first day of each and every month, to ascertain and report to the city counsel the names of all persons or firms engaged in the liquor traffic in said city, giving their place of business, whether licensed or unlicensed, and to notify any unlicensed liquor dealers to at once cease the traffic, and to make complaint against all persons selling liquor without license. *Held*, that the ordinance applied to all persons engaged in the liquor traffic; and it is the duty of the marshal to comply with the requirements of the ordinance, without reference to the quality of liquor sold at each sale by the person engaged in the traffic. *State v. Cummings*, Sup. Ct. Neb., March 11, 1885; N. W. Rep., 545.

19. MANDAMUS.—*Who Relator—When Proceeding against Public Officer.*—Where, by law, it is made the special duty of the incumbent of a public office to perform certain ministerial duties as such officer, and such duties cannot be legally performed by any other person to the full extent required by law, a writ of *mandamus* will issue, upon the application of any person interested, to compel the performance of such ministerial duties. *State v. Cummings*, Sup. Ct. Neb., March 11, 1885; N. W. Rep. 545.

20. ——. *Ancillary Process, but can be Exercised over Persons not Parties to the Judgment.*—There is no original jurisdiction in the circuit courts in *mandamus*, but it does not follow that because the jurisdiction in *mandamus*, is ancillary merely, that it cannot be exercised over persons not parties to the judgment sought to be enforced. *Commissioners v. United States*, Sup. Ct. U. S., Nov. 17, 1884; 5 S. C. Rep. 108.

21. ——. *Township Bonds—Tax Therefor—Whom to be Commanded to Levy—Trustee of Town—County Commissioners.*—In regard to bonds issued for railroad purposes by a township under a legislative act in Kansas, "to enable municipal townships to subscribe for stock in any railroad and provide for the payment of the same," and to judgments rendered thereon for principal or interest, the concurrence of the trustee of the township is not necessary for their payment, but the duty is laid upon the commissioners of the county to levy the tax upon the township for that purpose. *Ibid.*

22. ——. *Essentials of Effective Writ, when Duty is Shared by Several Officers.*—The relator is entitled to an effective writ, and he can have it only by joining in its commands all those whose co-operation is by law required, even though it be by separate and successive steps in the performance of those official duties which are necessary to secure to him his legal right. *Ibid.*

23. MORTGAGEE TRUSTEE FOR MORTGAGOR.— A mortgagee in possession before foreclosure, buying or paying off an outstanding lien for the purpose of protecting his possession, shall have what he has paid, with legal interest, and no more. *Comstock v. Michael*, Sup. Ct. Neb., March 11, 1885; N. W. Rep. 549.

24. ——. *Rents and Profits.*—A mortgagee in possession of productive real property before foreclosure, *held* liable for net rents and profits. *Ibid.*

25. MORTGAGE.—*Note Stipulating for Interest on Interest—Foreclosure—Attorney's Fee.*—J and E executed to H a mortgage note in the following form: "$2,500.00. Vinton, Iowa, March 6, 1879. On the sixth day of March, 1881, for value received, we promise to pay Elijah A. Hovey, or order, twenty-five hundred [$2,500.00] dollars, with interest thereon at the rate of twelve per cent. per annum, payable annually at Sioux Falls, D. T. Should any of the interest not be paid when due, it shall bear interest at the rate of twelve per cent. per annum, and a failure to pay any of said interest within thirty days after due shall cause the whole note to become due and collectible at once. It is also stipulated that should suit be commenced

for the collection of this note, a reasonable amount shall be allowed as attorney's fees, and taxed with the costs in the same suit. Due March 6, 1881." The mortgage further stipulated for an attorney's fee of $75 in the event of foreclosure. Default being made in payment of principal and interest, an action to foreclose was brought, and the court, in computing the amount due, allowed annual interest, upon the principal sum and also allowed annual interest or annual rests, in computing the interest upon the unpaid installments of interest from the time they became due until the date of judgment, at the contract rate of twelve per cent., and also allowed the attorney's fee as stipulated. *Held*, that the method of computation adopted by the court on the unpaid installments of interest which accrued previous to the time of the maturity of the principal sum was correct, but that unpaid installments accruing after maturity would not be subject to the annual-rest rule which obtained before maturity. *Held, further*, that the attorney's fee was properly allowed. Francis, J., dissents as to the allowance of attorney's fee. *Hovey v. Edmison*, Sup. Ct. Dak., Feb. 16, 1885; N. W. Rep. 594.

26. NEW TRIAL.—*Misconduct of Counsel.*—Where a party at the trial is prevented from having a fair trial, or if any of his rights at issue in the trial are prejudiced by the misconduct of his adversary's counsel, either by repeated or persistent offers of incompetent or irrelevant testimony, containing insinuations and charges prejudicial to him, or by slanderous statements made in addressing the jury, or if such misconduct prompted or influenced the jury to render a verdict not warranted by the evidence, or which they presumably would or could not reasonably have rendered had there been no such misconduct, a new trial should be granted. *Burdick v. Haggart*, Sup. Ct. Dak., Feb. 16, 1885; N. W. Rep. 589.

27. PRACTICE IN UNITED STATES COURTS.—*Mandate of Supreme Court—Decree of Lower Court—Second Appeal.*—When a mandate of this court, made after hearing and deciding an appeal in equity, directed such further proceedings to be had in the court below as would be consistent with right and justice, and that court thereafter made a decree which prejudiced the substantial rights of a party to the suit in respect of matters not concluded by the mandate or by the original decree, its action touching such matters is subject to review, upon a second appeal. *Mackall v. Richards.* Sup. Ct. U. S., Nov. 24, 1884; 5 S. C. Rep. 170.

28. —— *Instructing Jury Orally—Failure to Object—Waiver.*—Where instructions are given orally, and taken down in short-hand by the court stenographer, but are not taken by the jury in their retirement, and no objection is made at the time to this method of giving instructions, a right to except thereto is waived. *Stamm v. Coates*, Sup. Ct. Dak., Feb. 16, 1885; N. W. Rep. 593.

29. —— *Referee's Fees—Remedy to Recover—Joint Liability of Parties.*—When the attorneys of the respective parties to an action that has been referred by the circuit court to a referee, stipulate that such referee shall be allowed a certain *per diem*, and expenses, the referee may recover his fees and expenses by action against the parties jointly by virtue of the contract. *Malone v. Roby*, Sup. Ct. Wis., March 3, 1885; N. W. Rep. 575.

30. REMOVAL OF CAUSES TO FEDERAL COURT—*Joint Debtors in a Mortgage — Non-Resident Mortgagor.*—The foreclosure of a mortgage against several mortgagors, some of whom reside outside of the State, the mortgage debt being a unit, and all the mortgagors, resident and non-resident, being similarly bound, is not such a suit as may be removed to a Federal court under act of March 3, 1875. *Ayres v. Wiswall*, Sup. Ct. U. S., Nov. 10, 1884; 5 S. C. Rep. 90.

31. STATUTES—*Repeal by Implication.*—The rule reaffirmed that repeals of statutes by implication are not favored, and are never admitted where the former can stand with the new act. *Chew Heong v. United States*, Sup. Ct. U. S. Dec. 8, 1884; 5 S. C. Rep. 255.

32. —— *Retrospective Effect — Construction.* — Courts uniformly refuse to give to statutes a retrospective operation, whereby rights previously vested are injuriously affected, unless compelled to do so by language so clear and positive as to leave no room to doubt that such was the intention of the legislature. *Ibid.*

32. WITNESS—*Cannot be Impeached by Evidence of Statement of a Deceased Person.*—Where a suit is brought by plaintiff against the administrator of deceased and others, to recover his share of deceased's estate, the testimony of a witness as to the admissions and conduct of deceased cannot be impeached by statements of deceased to a third party as to the character of the witness, and the admission of such statements as evidence, against the objections of the plaintiff, is error for which he is entitled to a new trial. *Maryland v. Baldwin*, Sup. Ct. U. S. Dec. 15, 1884; 5 S. C. Rep. 278.

34. —— *Marriage—Absence of Ceremonies—Public Recognition.*—Where a marriage takes place by words only, without attending ceremonies, religious or civil, some public recognition of it, such as living together as man and wife, is necessary as evidence of its existence; and, in the absence of statutory regulations on the subject, the charge of the court should direct the jury to its necessity. *Ibid.*

## CORRESPONDENCE.

### NOT SO BAD, AFTER ALL.

*To the Editor of the Central Law Journal:*

I observe in the CENTRAL of the 10th a statement to the effect that, in this State "infidels" are not allowed to testify. In this you are slightly in error. Sec. 17 of chap. 169 of the Public Statutes, provides that "every person not a believer in any religion shall be required to testify truly under the pains and penalties of perjury; *and the evidence of such person's disbelief in the existence of God, may be received to affect his credibility as a witness.*" Sec. 18 of the same chapter provides that "no person of sufficient understanding * * * * shall be excluded from giving evidence as a witness in any proceeding," except husband and wife as to private conversations The bill to which you make reference as having been defeated by our Senate last year, was intended to abolish that feature of our law which allows a witness' infidelity to be flung at him. Public sentiment is doubtless ready for the enactment of such a law, but it is a notorious fact that the Massachusetts Senate can always be relied upon to pass laws not wanted by the people, and to kill laws

which meet the requirements of public opinion. Your reflections upon the action of the Senate are, doubtless, of practical application to the law in its present state. Yours very truly,

ELISHA GREENHOOD.

Boston, Mass., April 13, 1885.

## DID HE NOT WRITE BEN-HUR, A TALE OF CHRIST?

*To the Editor of the Central Law Journal:*

If your Indianapolis correspondents and other readers desire official light on the question of Gen. Lew. Wallace and the Battle of Shiloh, let them consult "War of the Rebellion; Official Records, Series 1, Vol. 10, Part 1, Reports; Part 2, Correspondence." Of Part 1, Reports, see especially pages 89-90, 169, 174-5, 178-190; of Part 2, Correspondence, pages, 40, 45, 90-1, 93-4. These citations throw light on all the disputed points as to the surprise, etc.; on the conduct of the battle; on Gen. Wallace's conduct, and on all the points raised in Mr. Judah's letter (20 Cent. L. J. 318), as to who placed Gen. Wallace at Crump's Landing, and why he was so placed, etc., etc.; and on Gen. Wallace's request for a *court martial*, and his *counter request* that action *looking to that end be suspended*. This "Official Record" is now issuing from the Government Printing Office, Washington. However, thousands of readers in the country are indebted to Gen. Lew Wallace; for has he not written "Ben-Hur, a Tale of the Christ?" a glorious book, and of which I heard our Chancellor, the Hon. W. S. Fleming, himself a scholar, says he would rather have been the author than be President.

FLOURNEY RIVERS.

Pulaski, Tenn., April 21, 1885.

## THE DEFEAT OF MR. JUSTICE COOLEY.

*To the Editor of the Central Law Journal*:

Your editorial in the JOURNAL of the 24th instant relative to the defeat of Judge Cooley speaks of it as a "great shame to the State of Michigan." Will you permit me space enough to express the opinion, with my reasons therefor, that the re-election of Judge Cooley, in the circumstances in which he had placed himself, would have been not only a "shame," but a disgrace to the State of Michigan; for it would have placed upon the Supreme Bench of that State a judge in the employ and pay, not of one railroad corporation alone, but of an association of many railroad companies—an association, too, which is, in the eye of the law, a criminal conspiracy to suppress competition, and to put up and keep up the prices of railway transportation.

I am not aware what were Judge Cooley's relations to railroads prior to 1882, but in that year he became one of the advisory commission constituted by the railway companies to investigate and report upon their "differential" rates between the West and the seaboard. In 1884 he became the arbitrator employed specially to represent the railway companies in the proceedings to adjust the rates upon live stock and dressed beef east bound from Chicago. Long before the expiration of his term upon the bench, he had become a permanent arbitrator of the "Trunk Line Pool." He had thus, while a justice of the Supreme Court of Michigan, entered the service of an organization that embraced all the principal railroad companies in Michigan, besides many others, any and all of which might become, as some in fact were, litigants in his own court. He had established relations with those companies which warranted grave doubts whether he was in a position impartially to decide disputes arising between them and the people. Such being the fact, his defeat was deserved, and indeed, it might have been expected. The only surprising thing about it is that Judge Cooley did not make defeat impossible, if not by resigning, at least by refusing to be a candidate for re-election.

I know it has not been unusual for judges to enter the employment of corporations. Judge Dillon did so, as did also Judge McCrary. But they resigned first, and became railroad lawyers afterwards. Judge Cooley is the first, and, within the scope of my observation, the only judge who has ever openly and at the same time tried to serve both the railroad companies and the State. I certainly recall no instance of Marshall, Story, or Kent ever doing anything of the kind. Can a man serve two masters? Is it a "shame" for the people of a great State to insist that men whom they place in the highest judicial positions in their gift, and to whom they pay a fair salary, shall serve them and their interests exclusively, or retire in favor of other competent men willing to do so? I think not, Mr. Edtor, and, by a liberal and commendable majority, so think the people of Michigan.

I do not wish to imply that there is anything necessarily wrong in performing legitimate railroad or other corporate services, and I do not question the right of Judge Cooley or any other lawyer in a proper manner and at a proper time to engage to render them. Nor am I unappreciative of Judge Cooley's pre-eminent learning and ability. But I insist that when Judge Cooley determined to enter the service of the railroad companies composing the "Trunk Line Pool," he should have resigned his position upon the bench. Since he failed to do so, and became a candidate for re-election, I cannot but consider his defeat as one of the best and most creditable results of popular suffrage and "off year" politics.

ADELBERT HAMILTON.

Chicago, April 27, 1885.

REMARKS.—The writer of the above is so well known to our readers that we feel warranted in printing it, notwithstanding the grave charges it contains. We have been greatly surprised and grieved at reading them. We knew that Mr. Justice Cooley was, in 1882, one of the arbitrators, selected, as we understood it, by the great trunk line railways, to adjust what were termed "differential rates" between the Western cities and the Atlantic seaboard. But we supposed that that was but a temporary employment, and that he, together with two other distinguished men—equally eminent for their wisdom and probity, Elihu B. Washburne and Allen G. Thurman,—had been selected with the view of coming to a decision such as would reconcile the opposing views of rival railway companies, rival boards of trade and rival cities. As we understood it then, we could not conceive of an employment more honorable for a private citizen; but we were grieved that Mr. Justice Cooley had accepted it while yet a justice of the Supreme Court of Michigan. Still, we had supposed that this service was temporary, and we have been immeasurably surprised at the above statement that he had, while occupying the same high judicial station, become the permanent arbitrator of a railway "pool," the very existence of which, we are old-fashioned enough to believe, is unlawful. If this charge is true, not only is the recent verdict of the people of Michigan eminently just, but we do not hesitate to say that the public life of Mr. Justice Cooley is at an end.—[ED.

## QUERIES AND ANSWERS.

*[Correspondents are requested to draw up their answers he form in which we print them, and not in the form of letters to the editor. They are also admonished to make their answers as brief as may be.—Ed.]*

### QUERIES ANSWERED.

*Query No. 19.* [20 C. L. J. 278.] Section of Iowa Code 3074: "The earnings of a debtor, if the head of a family, for his personal services, or those of his family, at any time within ninety days next preceding the levy of an execution, are exempt, and also from attachment." Now, A is the head of a family, and did labor for B in the months of July and August, 1884, amounting to the sum of $120. In September, October, November, 1884, and January, 1885, also February, 1885, payments were made, and a balance now remains of $50; the last payment was made less than ninety days before suit was commenced. Can A hold the balance as exempt from execution and set-off?

*Answer.* It is difficult to understand just what force or effect the questioner, in his own mind, attached to the times and circumstances of the payments made, which he narrates, as an examination of the section quoted clearly shows they have no bearing whatever on the question propounded. The intent of the law is to exempt the earnings of the debtor for ninety days; and, that there may be no doubt as to the time intended, the law specifically designates it as the "ninety days next preceding the levy," because such exemption was deemed for the best interest of both creditor and debtor. The reason was that it was thought best to place this much of the laborer's earnings beyond the reach of process, that he, the man who, by his personal services supported himself and family, might be the better prepared to discharge this duty. If, for this purpose, such earnings are not required for more than ninety days, all such earnings which accrued more than ninety days "next preceding the levy," are subject to process and set-off. Davis v. Humphrey, 22 Iowa, 137, cited by your correspondent in the issue of April 24, as sustaining the contrary view, fails to give any support to his position, while it is in accord with the view here taken. In that case the garnishee owed the debtor nothing at the time of service; but the debtor afterward worked for the garnishee four months, making a final settlement every ninety days, when all back wages were fully settled; the question was whether the creditor could reach any of these earnings. Under the circumstances they were held exempt. In Thomas v. Gibbons, 61 Iowa, 50, the court went further and held that wages earned after the service of garnishment process were not held thereby. See also Case v. Dewey, 20 N. W. Rep. 817, in which the Supreme Court of Michigan hold substantially the same doctrine. Under the facts given in the question, A is not entitled to hold the $50 as exempt from execution and set-off.

T. B. SNYDER.
Burlington, Iowa.

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*Query No. 9.* [20 C. L. J. 139.] Has a notary taking depositions any judicial power? Can he commit or punish a witness for refusal to answer questions? Can he determine what questions must be answered, although the witness claims a privilege not to answer?

*Answer.* In addition to the answer to the above query, published in the JOURNAL of April 24, 1885, permit me to add, that notwithstanding notaries are of very ancient origin, their duties and powers in the United States are prescribed by statute. Our statute (Rev. Stat. Mo. 1879, §§ 2133 and 4027) clearly and unmistakeably confers upon a notary the power to commit to jail a witness who persistently refuses to answer a proper question. See also *Ex parte* Priest, 76 Mo. 229 and authorities there cited, which fully sustain this theory of the case.

CHAS. A. PATTON.
Albany, Mo.

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## JETSAM AND FLOTSAM.

EXPENSIVE EXPECTORATION.—In the case of Draper v. Baker, lately decided by the Supreme Court of Wisconsin, a verdict for $1,200 as damages for assault and battery upon the plaintiff, by spitting in her face, was held not so large as to induce the court to believe that the jury were actuated by passion, prejudice, or other improper motive. Of course the plaintiff was a woman.—*American Law Record.*

ABRAHAM LINCOLN AS A YOUNG LAWYER.—It was while Lincoln lived at New Salem that he managed to buy a second-hand copy of "Blackstone's Commentaries" and began to study law. Other books, however, he had none, nor would he have had any means of getting any had not an old friend and fellow-soldier in the Black Hawk war, who had become a successful lawyer at Springfield, offered him the use of his collection, which, for a new country was respectable. In order to exchange one book for another, however, he had to walk from New Salem to Springfield, a distance of fourteen miles, and, it is said, would often master thirty or forty pages of the new volume on his way home. He was often seen seated against the trunk of a tree, or lying on the grass under its shade, poring over his books, and changing his position as the sun advanced so as to keep in the shadow. He very soon began to make a practical application of his knowledge, buying an old form book and essaying to draw up contracts, deeds, leases and mortgages for his neighbors. He also began to exercise his forensic ability in trying small cases before justices of the peace, and soon acquired a local reputation as a speaker, which gave him considerable practice. But he was scarcely able to earn in this way money enough for his maintenance from day to day. On one occasion an impatient creditor seized his horse, which was indispensable to a lawyer's practice in those parts, and sold it under execution. Lincoln was discouraged by this blow; but, luckily some friends bid in and restored to him the property.—*Ex.*

THE SALE OF OLEOMARGARINE.—Louis Doscher, a South Brooklyn grocer, has been acquitted of selling oleomargarine on the ground that he was deceived, believing the stuff to be "fine creamery butter." If such a defense is sufficient to secure an acquittal the oleomargarine laws will prove a farce, and the legislature might as well strike out the $50,000 appropriation for their enforcement. It is a singular fact that after all the legislation on this subject—a half dozen laws having been passed to prevent the sale of oleomargarine—little has been accomplished. The oleomargarine monopoly proves to be the most powerful combination the State has yet tried to cope with.—*New York Tribune.*

THE "LAW REPORTS" ON TREES.—We are reminded of the definition of language as "an instrument for concealing thought," in reading the head-note of the case *In re Ainslie*, in the January number of the Chancery Division of the *Law Reports*, which is as follows:—"At the death of a testator, the owner in fee

of larch plantations, a large number of the larch trees had been more or less uprooted by extraordinary gales: Held, that trees which might continue to live but could not grow as ordinary trees, belonged to the executor, and trees that would continue to grow, but would have to be cut for the proper cultivation of the plantations, belonged to the tenant for life under the will." By a severe effort we can arrive at a faint idea of "a tree which may continue to live, but cannot grow as an ordinary tree;" but when it comes to "a tree which will have to be cut down, but yet will continue to grow," we confess ourselves beaten.—*Canada Law Journal.*

THE VENGEANCE OF A LITIGANT.—We find the following in the *Law Journal* (London): "It is stated that a landowner named Timmermans, who had ruined himself by lawsuits, has assassinated, out of vengeance, the two barristers Van Oppen, father and son, and a female member of their family, at their house in Maestricht. He made use of a revolver and a dagger. He has been arrested." In certain wild sections of America they do even worse. They kill the judges, and then get acquitted on the ground of insanity.

GREASE HER KNEE.—The Richmond *Herald* gives an interesting story of the Reid-Marshall duel during the Mexican war. After Mexico was taken, Captain Mayne Reid, the novelist, was blacking his boots in his quarter, humming softly to himself a stanza from "Marco Bozzaris:"

"At midnight in his guarded tent,
The Turk lay dreaming of the hour
When Greece, her knee in suppliance bent,
Should tremble at his power.

"Grease her knee—now why should she grease her knee?" he heard some one say behind him, and looking up saw E. C. Marshal, (recently attorney-general of California.) Ried's angry scorn of such an interruption did not find vent for a minute or so, but finally he blurted out, "You are a —— —— fool." A challenge followed, and Marshal had a finger shot off for his atrocity.

SOLVING A PROBLEM.—An amusing story is told of the late Mr. Justice Byles. The learned judge was an excellent short-hand writer, having early in life graduated as a reporter. At the Somerset assizes on one occasion, as was customary, he read portions of the evidence to the jury, but floundered hopelessly in the middle of a sentence. There was an awkward pause, and the jury and bar nervously awaited the result. His lordship at last, after many efforts to decipher the missing word, dropped his dignity, and leaning over toward the reporters below, inquired: "Can any of you gentlemen assist me to a word here? I have not put in the vowels, and what I have in my book looks as if a witness had said: 'Go and call in the baby,' but"—with a puzzled look—"it can't be that, because there is no baby in the case." One of the reporters was equal to the occasion, and putting in the right vowel, the word "bobby was the result, and the judge continued his charge.—*Manchester Times.*

EFFECT OF FUSION OF LAW AND EQUITY IN ENGLAND.—The London correspondent of the Canada *Law Journal* writes on this subject as follows: It has long been in my mind to say something of the nominal fusion of law and equity. The judicature acts have now been in force so long that the process of blending ought to be complete if it was ever possible. It amounts to nothing more than this, that an equity doctrine is occasionally brought forward in the Queen's Bench Division where it is considered with curious awe by counsel and judge, notwithstanding that it is always described as "well-known." Occasionally, too, a judge of the Queen's Bench Division sits in the room of, or rather to assist, his brother of the chancery side. Mr. Justice Field is doing so now to aid Mr. Justice Chitty, who, as a popular judge and courteous, has a list unduly full; and Mr. Justice Field usually says, by way of overture to the proceedings: "You will understand, of course, that I am perfectly ignorant of these matters." One symptom of the forensic manner of the age may, perhaps, be due to the fusion. Conversation has now taken the place of oratory, and disputatiousness has conquered argument. There is hardly a judge on the bench who will allow a man to state his contention in his own words without interruption by questions; yet the normal consequence of such interruption is waste of time and, upon the part of the advocate who often fails to state his real argument, of temper.

SPRING POETRY.

I sing of spring,
A thing
Not seen of late,
Though winter's fate
Has long been sealed
Or else congealed
By April's icy breath.
No leafy bowers
Nor April showers
Now meet us
Or greet us.
No zephyr's mild,
But cold blasts wild,
Now vex us
From Maine to Texas,
And chill us
And kill us
With figurative death.
Come, gentle Spring, and let the ice
No longer hold thee in a vise!
Let all the blossoms bloom in joy,
And cease to dally and be coy.
Put out the fires in our grates,
And light them high when Sol awaits
In shivering agony, till the word
From thy sweet lips by him is heard,
To banish winter with a slap
And take him lingering from your lap.
—[*Kentucky Yeoman.*

A spiritual medium is on trial in St. Louis, for obtaining money under false pretenses, the plaintiff averring that the alleged medium received his money under agreement that he should be placed in communication with departed spirits, which agreement he states was not fulfilled. After a great mass of testimony having been introduced by the defense to show the genuineness and good intentions of the medium, the judge before whom the case was being tried, becoming wearied with the mass of testimony, suggested the novel expedient in order to bring the case to a more speedy close, that the defense bring some departed spirits into court to testify, which proposition was rejected by the attorney for the defense.